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82-656

Case No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS P. POMEROY, *Petitioner*,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOEL D. WARE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Is an "opinion" which implies the allegation of undisclosed defamatory facts as its basis absolutely privileged under the first amendment, as the courts below held?

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OPINION BELOW

The opinion below is reported: *Pomeroy* v. *Southern Bell Tel. & Tel. Co.*, 410 So.2d 647 (Fla. 3d DCA 1982), *petition for review denied*, ___ So.2d ___ (Fla. 1982).

JURISDICTION

The Florida Third District Court of Appeal entered its decision on March 9, 1982. The Florida Supreme Court denied the petition for discretionary review, without opinion (and with one dissent), on July 16, 1982.

This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Thomas P. Pomeroy sued Southern Bell Telephone and Telegraph Company and Joel D. Ware (collectively referred to as "Southern Bell") for libel and slander. Southern Bell moved to dismiss on several grounds, including the First Amendment. The trial court dismissed Pomeroy's initial and only complaint, with prejudice, and without leave to amend.

The Third District Court of Appeal affirmed, and the Florida Supreme Court denied discretionary review without opinion.

Irked by adverse recommendations by a Dade County, Florida evaluation team (headed by Pomeroy) on telephone service for the County, Southern Bell Vice President Joel D. Ware wrote to Pomeroy's superior (with copies to Southern Bell and County officials) and charged that Pomeroy had somehow spoiled the objectivity of the bidding process. The letter stated:

> Dear Roger:
>
> I have previously expressed to you that the evaluations by the County Communications Evaluation Committee are being grossly biased against Southern Bell by Tom Pomeroy. I have personally reviewed the details of some of these evaluations and formed this opinion.
>
> I was shocked today to find an additional impact his evaluations are having on Southern Bell. The attached *County* evaluation sheet was attached to a proposal on a competitive case with one of our business customers.

> Roger, I don't believe that you condone this practice of allowing Southern Bell management to be put in embarrassing situations as a result of apparent unobjectivity on the part of staff.

/s/ Joel

Florida's Third District Court of Appeal affirmed the dismissal of Pomeroy's complaint in a brief opinion:

> In our view, the allegedly defamatory statements sued upon were no more than expressions of opinion and were therefore properly determined to be nonactionable as a matter of law. *From* v. *Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981); *Palm Beach Newspapers, Inc.* v. *Early*, 334 So.2d 50 (Fla. 4th DCA 1976), *appeal dismissed, cert. denied*, 354 So.2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978).

Pomeroy timely petitioned the Florida Supreme Court for discretionary review under Article V, § 3(b), Florida Constitution (1980), and that Court, in a 4-to-1 decision without opinion, denied review.

REASONS FOR ALLOWING THE WRIT

The Florida courts have misconstrued this Court's decisions and have improperly used the First Amendment as a shield for any defamatory statement that the author may cloak under the guise of an opinion.

As this Court has stated, "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The Florida courts, however, have taken the decision in *Gertz* to require a blanket immunity based on what the courts have misperceived as an absolute distinction between "opinion" and fact.

Florida's departure from this Court's precedents began with the decision in *Palm Beach Newspapers, Inc.* v.

Early, 334 So.2d 50 (Fla. 4th DCA 1976), *appeal dismissed, cert. denied*, 354 So.2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978). In *Brown Transport Corp.* v. *Atcon, Inc.*, 439 U.S. 1014, 1022 (1978), Justice White (joined by Justice Blackmun, dissenting from a denial of certiorari), listed *Early* among the decisions passed over by this Court which nevertheless presented "important questions of federal law not heretofore determined by this Court."

In *Early*, a school superintendent sued for libel based on a series of newspaper articles and editorials critical of his performance in office:

> Plaintiff/appellee complained that the defendants characterized his tenure in office as *unsuccessful*, and stated that he was unfit to hold the office of Superintendent of Public Instruction because of his *ineptness*, *incompetence*, and *indecisiveness*.

334 So.2d at 52 (emphasis in original). The court concluded that those statements were pure opinion and therefore not actionable:

> [*Gertz* v. *Robert Welch*] made clear that the defamatory falsehood referred to in the *New York Times [Company* v. *Sullivan*, 376 U.S. 254 (1964)] standard refers to a statement of fact as opposed to pure comment or opinion:
>
> > We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.
>
> It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and

> convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

334 So.2d at 52.

Florida's other courts of appeal have followed *Early* and its simplistic fact/opinion dichotomy. *See Lampkin-Asam* v. *Miami Daily News, Inc.*, 408 So.2d 666, 667 n.1 (Fla. 3d DCA 1982), *petition for review denied*, 417 So.2d 329 (Fla. 1982), *cert. denied*, ___ S.Ct. ___ (1982) (opinion held "entitled to absolute constitutional protection," citing *Early* and *Gertz*); *From* v. *Tallahassee Democrat, Inc.*, 400 So.2d 52, 57 (Fla. 1st DCA 1981), *pet. for review denied*, 412 So.2d 465 (Fla. 1982) ("*Gertz* would indicate that expressions of opinion are privileged and protected by the Constitution."); *Coleman* v. *Collins*, 384 So.2d 229, 231 (Fla. 5th DCA 1980).

Petitioner respectfully submits that the Florida courts have emasculated common law defamation in their mistaken homage to the First Amendment. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 292 n.30 (1964), this Court stated that the fundamental importance of the free exchange of ideas requires that "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact."

This language, and the Court's recognition in *Gertz* that "there is no such thing as a false idea," do not require the states to balance the important competing interests represented by the First Amendment and defamation law on so flimsy a fulcrum as a distinction between fact and opinion.

The Restatement (Second) of Torts § 566 (1977) properly recognizes that the line is not so easily drawn as presumed by the Florida decisions:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

As explained in comment (c) to the Restatement:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Here, Southern Bell charged that Pomeroy was "biasing" what was supposed to be an objective bid evaluation procedure—that Pomeroy was taking affirmative acts to spoil the objectivity of the process. An opinion such as this, which implies as its basis undisclosed defamatory facts, is not protected by the First Amendment. "[T]here is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340.

Pomeroy submits that the Florida courts have overextended the First Amendment and denied Pomeroy his right to redress for the ruination of his career by South-

ern Bell's defamation. Nothing in the First Amendment requires such a result.

CONCLUSION

For these reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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